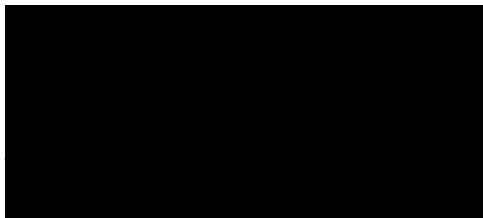




U.S. Citizenship  
and Immigration  
Services

B4



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: AUG 19 2004

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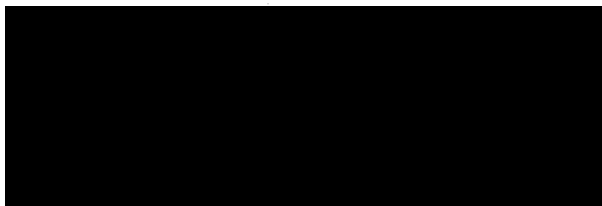
Petitioner:

Beneficiary:




PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**DISCUSSION:** The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation originally organized in the State of California in October 1991. It imports industrial instruments for sale and distribution. It seeks to employ the beneficiary as its marketing manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. The director also determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief in response to the director's decision.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

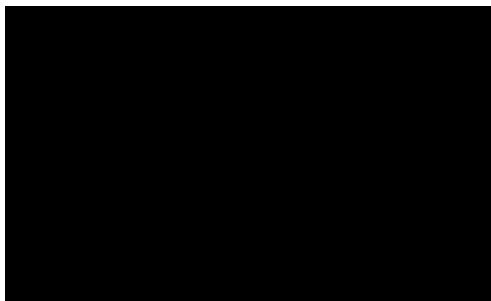
*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner has provided sufficient evidence that two brothers, Farhad Forbes and Naushad Forbes, each own 50 percent of the United States entity. The petitioner claims an affiliate relationship with the beneficiary's foreign employer. The petitioner has indicated that the foreign entity is owned as follows:



13.32%  
13.32%  
13.33%  
7.76%  
3.6%  
17.90%  
30.70%

\_\_\_\_\_ and \_\_\_\_\_ are husband and wife.

\_\_\_\_\_ owns 3.88 percent of his 7.76 percent interest jointly with \_\_\_\_\_

\_\_\_\_\_ and 3.88 percent of his 7.76 percent interest jointly with \_\_\_\_\_

\_\_\_\_\_ owns 1.8 percent of her 3.6 percent interest jointly with \_\_\_\_\_

and 1.8 percent of her 3.6 percent interest with \_\_\_\_\_ and \_\_\_\_\_

\_\_\_\_\_ owns 43.39 percent, \_\_\_\_\_ owns 34.16 percent, and \_\_\_\_\_ owns 22.45 percent of Farhad Investment Pvt. Ltd.

The director incorrectly observed that the petitioner's 1994 California Notice of Transaction shows an unrelated entity and that the submission of this document does not comply with the director's request for a copy of the petitioner's Notice of Transaction. As counsel for the petitioner indicates on appeal, the petitioner explained and provided evidence of the petitioner's valid change of name. The director's determination regarding the petitioner's California Notice of Transaction is withdrawn.

The director correctly observed that the petitioner did not provide evidence of the ownership of Farhad [REDACTED]. The director concluded that without complete evidence of the foreign entity's ownership, the petitioner had not submitted sufficient evidence to determine that an affiliate relationship existed between the petitioner and the foreign entity. The AAO observes that the director did not request evidence of the foreign entity's ownership in his January 30, 2002 request; thus, the AAO has considered all evidence of the ownership of the foreign entity submitted on appeal.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this matter, no one individual owns a majority interest in the petitioner or in the foreign entity and no one individual controls both companies with a majority interest. In this matter, two brothers own the U.S. entity. The same two brothers own interests in the foreign entity along with three other individuals and two investment companies. Neither brother owns a controlling interest in the foreign entity. The two entities are not "owned and controlled by the same group of individuals, each individual owning controlling approximately the same share or proportion of each entity . . .," as required by 8 C.F.R. § 204.5(j)(2). Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals in approximately the same proportion.<sup>6</sup> Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

The second issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

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[REDACTED] owns 13.03 percent, [REDACTED] owns 53.03 percent, and [REDACTED] owns 33.94 percent

<sup>6</sup> The AAO notes that the foreign entity is a family business. However, absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individual controls both entities. A familial relationship is not sufficient to legally bind the various family members to vote in concert. Thus, the two entities are not owned and controlled by the same parent or individual.

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a November 12, 2002 letter appended to the Form I-140, Immigrant Petition for Alien Worker, the petitioner stated that the beneficiary "will be primarily responsible for planning, developing, and establishing the marketing goals and objectives of our North American operation," and "[h]is duties will be expanding sales territories, as well as the employing, training, supervising and overseeing the sales representatives in those territories." The petitioner stated that the beneficiary's specific management duties included:

- (a) Continuing to direct and implement our business marketing plan in accordance with our planned expansion, while coordinating with the requirements and expansion capacity of Indian affiliate;
- (b) Directly overseeing the selection, hiring and training of sales representatives, based on engineering skills necessary for the sale, installation and technical support for our product lines[;]
- (c) Analyze our activities, costs, operations and forecast data to determine progress and success of the implementation of the company's marketing goals and objectives, and make decisions based on this analysis.

On January 30, 2003 the director requested: (1) a copy of the petitioner's organizational chart including the current names of all executives, managers, supervisors, and number of employees within each department; (2) a brief description of job duties, educational level, date of employment and annual salary for each employee under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties including the approximate percentage of time the beneficiary spent in each of the duties; and, (4) copies of the petitioner's California Forms DE-6, Employer's Quarterly Wage Report for the previous four quarters.

In response to the request for evidence, the petitioner stated the beneficiary's duties and responsibilities as:

- Developing and implementing the overall marketing strategy for the promotion of Forbes Marshall products through the current and future independent sales representatives in North America. (Time spent: 15-20%)
- Identifying, evaluating, selecting new representatives and training them on Forbes Marshall product range, pricing selling methods[.] (Time spent: 30-35%)
- Review for approval/counter proposals, any and all offers proposed by sales representatives, as well as any offers submitted directly from a territory in North America for which we do not have a representative[.] ([Time spent:] 10-15%)
- Develop, design information and guidance to the sales representatives on competitive pricing strategies and special pricing to secure business[.] (Time spent: 10-15%)
- Guiding the representatives on product application and areas where they can sell[.] (Time spent: 10-15%)
- Coordinating with the affiliate factories in India on the product quality, improvement and delivery issues. (Time [s]pent: 10-15%)
- Managing marketing needs, including the creation and maintenance of brochures, slide presentations, fact sheets and performance summaries, other monthly and quarterly collateral updates, article reprints, regional sales ideas, and distributor specific requests. (Time spent: 10-15%)
- Understanding the business process in different regions and adopting marketing strategy to suit the local needs. (Time spent: 5-7%)
- Working regionally with legal/compliance to adhere to applicable market regulatory requirements. (Time spent: 5%)

The petitioner added that the beneficiary supervises and directs sales representatives for Forbes Marshall product lines. The petitioner explained that the petitioner did not employ the sales representatives, but that the sales representatives bought and resold Forbes Marshall products at specially discounted prices or received a commission on completed sales. The petitioner listed 16 representatives in the United States, two representatives in Mexico, and one representative in Canada. The petitioner also provided copies of several standard sales representative agreements.

The petitioner also provided its California Forms DE-6 for the previous four quarters. The California Forms DE-6 indicated that the petitioner employed two individuals in each of the four quarters, but the petitioner listed only one employee on the Forms DE-6, the individual identified as the petitioner's operations manager. The petitioner described the operations manager as responsible for all administrative, financial, and commercial activities and noted that she did not supervise any employees.

The petitioner's organizational chart identified the position of president, marketing manager, and operations manager. The organizational chart showed the marketing manager (the beneficiary's position) and the operations manager reporting to the president. The organizational chart also showed that the sales representatives reported directly to the beneficiary's position as marketing manager.

The director determined, upon review of the record, that the sales representatives were subject to very little supervision from the beneficiary. The director noted that the sales representatives appeared to be owners or employees of various retail outlets that carried the petitioner's product. The director determined that the beneficiary appeared to directly sell the company's products to retailers. The director also determined that the record did not show that the beneficiary supervised the work of other supervisory, professional, or managerial employees. The director concluded that the beneficiary's direct involvement in sales did not sufficiently free the beneficiary from day-to-day tasks involving marketing the company's product. The director specifically noted that the beneficiary had not been shown to manage a function within the organization.

On appeal, counsel asserts that the beneficiary exercises de facto managerial control of independent sales representatives. The petitioner reiterates that the beneficiary locates, evaluates, and recruits new representatives; enters into contracts with qualified representatives; provides training, guidance, and support to these individuals; reviews their performance; and terminates contracts that fail to meet the goals set by the beneficiary. The petitioner states that the beneficiary "is primarily engaged in the management of the Manufacturer's Representatives."

Counsel also contends that the beneficiary manages an essential function. The petitioner explains that the beneficiary focuses exclusively on the managerial/executive aspects of his position and receives administrative support from the operations manager.

The petitioner adds that the beneficiary decides on the use of marketing methods, controls the marketing budget, devises the pricing policy, authorizes the special discounts or commissions, enters into sales contracts with large businesses, coordinates supplies from the Indian factory, and oversees the administrative manager with respect to maintaining accurate inventory records. Counsel concludes that this list of responsibilities confirms that the beneficiary also directs the management of a component or function of the organization,

establishes the goals of the component or function, exercises wide latitude in discretionary decision-making, and receives only general supervision from high-level executives; thus the beneficiary also complies with the definition of executive capacity.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The description of the beneficiary's duties does not demonstrate that the beneficiary will perform primarily managerial or executive duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, counsel for the petitioner refers to the beneficiary both as an executive, and as a manager managing an essential function and individuals. Although the regulations do not preclude an individual from performing in both an executive and managerial capacity, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that a beneficiary is both an executive and a manager. The petitioner has not done so in this matter.

Moreover the petitioner's initial description is nonspecific. The petitioner indicated that the beneficiary "will be primarily responsible for planning, developing, and establishing the marketing goals and objectives of our North American operation." However, the petitioner did not clarify who would carry out, analyze, and develop the market research. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Further, the petitioner stated that the beneficiary's duties would include "expanding sales territories, as well as the employing, training, supervising, and overseeing the sales representatives in those territories." This is a description of an individual who is allocating sales territories and directly supervising non-professional salespersons. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The petitioner's description and allocation of the beneficiary's duties in its response to the director's request for evidence confirms that the beneficiary is primarily performing the petitioner's marketing function and supervising non-professional employees. The beneficiary spends 40 to 57 percent of his time "[m]anaging marketing needs," and "[d]eveloping and implementing the overall marketing strategy," and "[d]evelop[ing], design information and guidance to the sales representatives," and "[u]nderstanding the business process in different regions and adopting marketing strategy." The petitioner does not provide any evidence that employees other than the beneficiary perform this function.

The petitioner also states that the beneficiary spends 40 to 50 percent of his time "[i]dentifying, evaluating, selecting new representatives and training them," and "[g]uiding the representatives on product application and areas where they can sell." Again these duties are indicative of an individual in a supervisory role. The



petitioner has not submitted evidence to show that the sales representatives hold professional positions. The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The petitioner has not provided evidence that its sales positions require advanced knowledge or learning, not merely skill, to perform the tasks associated with the position. As the record reflects that the beneficiary is the first-line supervisor of the sales representatives and sales positions are not professional positions, the beneficiary is a first-line supervisor of non-professional employees. As observed above, a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. See section 101(a)(44)(A)(iv) of the Act.

Counsel's assertion that the beneficiary is a function manager is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Here the petitioner explains that the beneficiary focuses on the managerial/executive aspects of his position; however, as determined above, the record shows that the beneficiary is primarily performing the tasks of a market analyst and first-line supervisor. The record does not support the petitioner's explanation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The record does not support counsel's conclusion that the beneficiary's duties such as deciding the use of marketing methods, controlling the marketing budget, devising the pricing policy, entering into contracts, and coordinating supplies are examples of executive duties. Managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. As observed above, the beneficiary is performing the operational tasks associated with marketing and supervising the sales of the petitioner's product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. In sum, the petitioner has not provided evidence that the beneficiary's assignment is primary managerial or executive in nature.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.